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In the Supreme Court of the United States

OCTOBER TERM 1931.

No. 54.

I. J. VAN HUFFEL,

Petitioner,

vs.

TRACE D. HARKELRODE,
Treasurer of Trumbull County, Ohio,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF TRUMBULL COUNTY, OHIO,
WRIT GRANTED MAY 25, 1931.

SUPPLEMENTAL BRIEF OF PETITIONER.

I—WHICH WRIT WAS PROPERLY GRANTED.

Counsel assume that the first question which this Court will desire to dispose of is as to which writ was properly granted, the one directed to the Court of Appeals of Trumbull County, Ohio, being cause No. 54, or the one directed to the Supreme Court of Ohio, being cause No. 55. Two petitions for writs of certiorari were filed (a) because counsel for petitioner were not certain as to which of the state courts this Court would hold to be possessed of the record, and (b) because, if they asked for a writ directed to the Supreme Court of Ohio, they were fearful that, if such writ were granted, they would be restricted in their argument to the question as to whether or not a constitutional question was involved, such being the only question passed upon by the Supreme Court of Ohio.

(a) Which State Court is Possessed of the Record?

The record of the proceedings had in the Court of Appeals consists of all the original pleadings and papers which had been filed in this cause, together with a transcript of docket and journal entries and the certificate of the Clerk.

Upon receiving an adverse decision in the Court of Appeals the petitioner filed in the Supreme Court of Ohio both a petition in error as of right, claiming a constitutional question to be involved, and a motion requesting the Supreme Court of Ohio to direct the Court of Appeals to certify thereto its record for review. (R. 27) Article IV, Section 2 of the Constitution of Ohio provides that the Supreme Court

> "• • • shall have • • • appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state, • • •. In cases of public or great general interest the Supreme Court may, within such limitation of time as may be prescribed by law, direct any court of appeals to certify its record to the Supreme Court, and may review and affirm, modify or reverse, the judgment of the court of appeals."

When filing a mtion to certify the record, one is not required to file therewith the record of the proceedings had in the Court of Appeals. Upon filing a petition in error, however, one must file therewith the record of the proceedings had in the Court of Appeals. Section 11263 of the General Code of Ohio provides:

> "With his petition plaintiff in error shall file either a transcript of the final record or a transcript of the docket and journal entries with such original papers or transcripts thereof as are necessary to exhibit the error complained of. • • •"

In the case at bar, petitioner, upon filing his petition in error in the Supreme Court of Ohio, filed therewith the

record of the proceedings had in the Court of Appeals. (R. 27). Petitioner, being then advised that respondent would file a motion to dismiss the petition in error upon the ground that no constitutional question was involved, filed a stipulation, as is common practice, to postpone the printing of the record until such motion was disposed of. (R. 28, and see Rule IV, 122 O. S. lxvii.) The Supreme Court of Ohio denied petitioner's motion for an order certifying the record and sustained respondent's motion to dismiss the petition in error filed as of right, holding that no debatable constitutional question was involved. (R. 28, 29) The record of the proceedings had in the Court of Appeals was then returned to the Clerk of the Court of Appeals in accordance with Rule IX of the Supreme Court of Ohio which provides as follows (122 O. S. lxxii):

> "After the decision of a cause in the Supreme Court, in which a final record is not required to be made in that Court, the original papers shall be returned to the Clerk of the proper Court; when so returned, the Clerk of the Supreme Court shall seal them up and direct them to the Clerk of such Court, and forward them as said Clerk may in writing direct. If not so directed within a reasonable time, they may be sent by express."

The record and original papers having been returned to the Court of Appeals and no copy thereof having been retained by the Supreme Court of Ohio, it seems to follow that the writ of certiorari granted by this Court in cause No. 54 was properly directed to the Court of Appeals of Trumbull County, Ohio, and that the writ granted in cause No. 55 directed to the Supreme Court of Ohio was improperly granted.

Hodges et al. v. Snyder, 261 U. S. 600, 601;
Sheehan Co. v. Shuler, 265 U. S. 372, 375.

This conclusion, however, seems contrary to the opinion of this Court in *Matthews v. Huwe*, 269 U. S. 262. In that

case Matthews sought to enjoin the levy and collection of certain special assessments upon the ground, among others, that the same were assessed in violation of the federal and state constitutions. A petition in error filed as of right in the Supreme Court of Ohio was dismissed, as in the case at bar, because no debatable constitutional question was involved. A writ of error directed to the Court of Appeals of Hamilton County, Ohio, was granted by this Court. Upon motion to dismiss it was held that the writ was improperly granted, first, because the petitioner had not exhausted his remedies in the state courts, in that he did not file in the Supreme Court of Ohio a motion to require the Court of Appeals to certify thereto its record for review, and second, because it appeared that the Supreme Court of Ohio had passed upon the merits of the controversy in holding that the constitutional question, the only federal question involved, was not debatable, and that consequently the writ of error granted should have been directed to the Supreme Court of Ohio. The *Huwe* case is distinguishable from the case at bar in that the only federal question there presented was a constitutional one, and the dismissal of the petition in error by the Supreme Court of Ohio, upon the ground that the constitutional question was not debatable, was not merely a dismissal for lack of jurisdiction but was likewise a dismissal upon the merits. In the case at bar the alleged constitutional question, to-wit, that the Court of Appeals failed to give full faith and credit to a judgment of the court of bankruptcy, was not determinative of the merits of the controversy or the main federal question presented, which is, "does a court of bankruptcy have the power and authority to sell the real estate of a bankrupt free and clear of a tax lien claimed by the State of Ohio and County of Trumbull?"—a question which was not passed upon by the Supreme Court of Ohio. Again, in the *Huwe* case it does not appear that the record was returned to the Court of Appeals.

Counsel are of the opinion that, inasmuch as the dismissal of petitioner's petition in error by the Supreme Court of Ohio upon the ground that no debatable constitutional question was involved was not determinative of the main federal question herein presented, and inasmuch as the record was returned by the Supreme Court of Ohio to the Court of Appeals of Trumbull County, Ohio, the writ of certiorari granted by this Court in cause No. 54 to the Court of Appeals of Trumbull County was the writ which was properly granted.

Turnpike Co. v. Virginia, 225 U. S. 264, 269;
Hodges et al. v. Snyder, 261 U. S. 600, 601;
Sheehan v. Shuler, 265 U. S. 372, 375.

(b) This Court is not Restricted to the Constitutional Question Passed on by the Supreme Court of Ohio.

Should this Court determine that the writ of certiorari directed to the Supreme Court of Ohio was the writ which was properly granted, then it is submitted that this Court, in its review, is not restricted to the constitutional question raised by petitioner's petition in error filed in such court, because the real federal question involved, to-wit, the jurisdiction, power and authority of the bankruptcy court under the Acts of Congress to sell a bankrupt's real estate free from the lien of state taxes, appears in the record of the proceedings had in the state trial court and was the main question there presented.

Silver v. Silver, 280 U. S. 117, 122;
Saltonstall v. Saltonstall, 276 U. S. 260.

II—JUDGMENT OF BANKRUPTCY COURT WAS NOT VOID.

Respondent, in his brief in opposition to the petition for a writ of certiorari herein filed, contends that the judgment of the bankruptcy court was void, and that he therefore has the right to attack the same collaterally, as he is

here doing. His right to do so, if the judgment is void, is not denied. Respondent's theory is that Section 104 of Title 11, U. S. C. (Section 64 of the Bankruptcy Act), gives a bankruptcy court the right merely to determine the legality and amount of taxes, and to order the same paid, and that when it inquires into the question of taxes for any other purpose it is exercising a jurisdiction not conferred upon it by the Bankruptcy Act. Certainly a bankruptcy court cannot order taxes paid until it has in some manner liquidated the estate and converted its assets into money. Section 1, Title 11, U. S. C. (Section 2 of the Bankruptcy Act), grants to bankruptcy courts such jurisdiction at law or in equity as it necessary to reduce bankrupt estates to money and distribute the same to those rightfully entitled thereto. In so doing the bankruptcy court must choose the method of liquidation; that is, it must determine whether it will be advantageous to the estate to administer certain property or abandon it, to sell certain property free from liens, transferring the liens to the fund to be derived from the sale thereof, or sell the same subject to liens. This right of the bankruptcy court has been held to be exclusive.

In *Isaacs v. Hobbs Tie & Timber Company*, 282 U. S. ...., 51 S. C. Rep. 270, 75 L. Ed. 332, decided February 24, 1931, the Hobbs Tie & Timber Company filed suit in a state court of Arkansas to foreclose a mortgage upon the property of one who had previously been declared to be a bankrupt by the District Court of the United States for the Northern District of Texas. The trustee in bankruptcy was named as a party defendant, and caused the case to be removed from the state court to the United States District Court for the Western District of Arkansas, where he filed an answer and in substance set up that the District Court for the Western District of Arkansas was without jurisdiction because of the bankruptcy proceedings,

alleging that the District Court for the Northern District of Texas, being the court which had declared the bankrupt a bankrupt, had exclusive jurisdiction. The District Court for the Western District of Arkansas entered a decree of foreclosure and sale providing that any surplus of the purchase money over and above the amount due the Hobbs Tie & Timber Company, plus costs, should be paid to the trustee in bankruptcy. In reversing the judgment of the District Court this Court said:

> "Thus, while valid liens existing at the time of the commencement of the bankruptcy proceedings are preserved, it is solely within the power of a court of bankruptcy to ascertain their validity and amount and to *decree their method of liquidation.*" (Italics ours.)

In *Straton v. New*, 282 U. S. ...., 51 S. C. Rep. 465, 75 L. Ed. 617, decided April 20, 1931, the bankruptcy court enjoined certain commissioners appointed by the state court of West Virginia from proceeding with the sale of certain real estate of the bankrupt to enforce liens thereon which had been acquired in the state court more than four months prior to the institution of bankruptcy proceedings. In speaking of the jurisdiction of the bankruptcy court this Court said:

> "It may inquire into the validity of liens, *marshal them and control their enforcement and liquidation.*" (Italics ours.)

In the exercise of this exclusive jurisdiction, and in marshalling liens, the bankruptcy court must of necessity determine the priority of the respective lien claimants, including the taxing authorities of both federal and state governments. Thus in *In re Alamac Operating Corporation*, 42 F. 2d 120 (C. C. A. 2d Circuit 1930), the bankruptcy court denied the claim of the State of New York for priority on account of a license tax under Section 104(b)(6) and awarded priority under Section 104(b)(7). In

In re Monroe Lumber & Supply Company, 36 F. 2d 1003 (D. C. M. D. Pa. 1929), corporation loan taxes due the Commonwealth of Pennsylvania, which had been settled and approved prior to the adjudication in bankruptcy, were given a priority in payment, while those taxes which had not been settled and approved until after adjudication were denied priority in payment. In *City of Chelsea v. Dolan*, 24 F. 2d 522 (C. C. A. 1st Circuit 1928), certiorari denied 277 U. S. 606, taxes due the City of Chelsea were denied priority over wage claims, though the bankruptcy proceedings had been instituted prior to the 1926 amendment to Section 104, no order of distribution having been made until subsequent to the time that the 1926 amendment took effect.

In *United States Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205 (1912), a surety for a bankrupt public contractor filed a suit in equity in the Circuit Court seeking an adjudication of certain claims against the bankrupt and a determination of their priority. Mr. Justice Van De Vanter said, page 218:

> "These matters are rightly subjects for proceedings in bankruptcy, and therefore fall within the *exclusive jurisdiction of the court of bankruptcy*. A distinct purpose of the bankruptcy act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy. Creditors are entitled to have this authority exercised, and justly may complain when, as here, an important part of the administration is sought to be effected through the slower and less appropriate processes of a plenary suit in equity in another court, involving collateral and extraneous matters with which they have no concern, such as the controversy between the complainant and the indemnitor banks." (Italics ours.)

See also *Supply Co. v. Dattle*, 44 F. 2d 159 (C. C. A. 3rd Circuit 1930).

In exercising this jurisdiction, decreeing the method of liquidation and determining the priority of lien claimants, errors are bound to occur. But this fact detracts not one iota from the jurisdiction, power and authority of the bankruptcy courts. To correct such errors the bankruptcy law affords a remedy, to-wit, the filing of a petition to review the findings of the referee. A case substantially on all fours with the present case is that of *In re De Angeles*, 36 F. 2d 218 (C. C. A. 10th Circuit 1929). In this case the Treasurer of Carbon County, Utah, filed with the referee in bankruptcy an unverified statement of taxes due from the bankrupt. The trustee, believing that the County had no claim for such taxes, reported his opinion to the referee, who sent notices to the creditors, including the Treasurer of Carbon County, in which he stated that a meeting would be held on September 27, 1926, to consider the matter of taxes claimed by Carbon County. No one representing Carbon County appeared at the meeting on September 27, 1926, and the referee entered an order disallowing its claim for taxes. On March 24, 1928, a petition to review was filed by Carbon County, setting forth that it had not been represented at the meeting of September 27, 1926, and had not been advised of the disallowance of its claim for taxes until March 20, 1928. The District Court dismissed the petition to review upon the ground that it had not been filed within a reasonable time. In affirming this order of dismissal the Circuit Court said:

> "The referee has authority, however, to examine tax claims and to pass upon their validity and amount. • • • Hence, the notice of September 2, 1926, that the referee proposed to consider taxes claimed by Carbon County was notice to the County that the referee proposed, under Section 64(a), to inquire into the validity and amount of the taxes claimed. It is true that the County alleges it had no notice of any objection to its

claim to taxes. It may have been entitled to reasonable notice of the objections urged, prior to the hearing, but the failure to serve notice of such objections was no excuse for Carbon County's failure to appear at the hearing. Its failure to ascertain the result of the hearing on its tax claim was due to its own neglect and affords no ground for its delay, for a period of more than fifteen months, to take any steps to secure a review of the referee's decision."

In *Fierman v. Seward National Bank*, 37 F. 2d 11 (C. C. A. 2d Circuit 1930), the court said, on page 13:

"It is elementary that the Pennsylvania bankruptcy court had jurisdiction to collect and distribute the estate of the Pennsylvania bankrupt, the Hardwood Company. When the bankrupt's property was sold free of liens, the liens upon the property became rights against the substituted proceeds of sale, and claimants to this fund were obliged to assert their rights by applying to the court in whose custody it was. See *In re Rochford*, 124 F. 182 (C. C. A. 8); *In re Kohl-Hepp Brick Co.*, 176 F. 340 (C. C. A. 2); *Murphy v. John Hofman Co.*, 211 U. S. 562, 29 S. Ct. 154, 53 L. Ed. 327. Hence the bank, claiming ownership of the bonds, very properly intervened in the Pennsylvania proceedings, at first to prevent the destruction of its lien by the proposed sale, and later to reach the substituted fund. Indeed, no other course was open to it, if it wished to realize anything upon its collateral security."

To the same effect see *Delahunt v. Oklahoma County*, 226 F. 31 (C. C. A. 8th Circuit 1915), wherein a parcel of real estate was sold for less than taxes which, by state statutes, were a permanent lien thereon.

The court of bankruptcy, being thus vested with exclusive jurisdiction to determine the method to be pursued in liquidating the bankrupt's estate, in marshalling liens thereon and determining the priority of the respective lien claimants, including the taxing authorities of both federal and state governments, had the right in the instant case

to order a sale of the real estate of The Sterling-Knight Company, free and clear of liens, including the tax lien claimed by respondent as Treasurer of Trumbull County, Ohio. Such order was but the adoption of one of the many methods of reducing the bankrupt's estate to cash and, under the authorities above, can not in any wise be said to be void or lacking in authority under the Bankruptcy Act.

Respondent further contends that the bankruptcy court was without jurisdiction to transfer his lien for taxes from the property to the fund to be derived from the sale thereof because of the provisions of Section 5671 of the General Code of Ohio, which provides as follows:

> "The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalties accruing thereon, are paid. * * *"

By virtue of this statute respondent says that all taxes are a permanent lien upon the real estate against which they are assessed, which lien is perpetual and can be removed only by payment in full or by one of the methods prescribed by the Sovereign State of Ohio. This is tantamount to saying that the state can deny to a federal court of bankruptcy a jurisdiction conferred upon such court by the federal bankruptcy act. Such position cannot, it is submitted, be maintained. *International Shoe Co. v. Pinkus*, 278 U. S. 261; *New Jersey v. Anderson*, 203 U. S. 484. In *Mason v. United States*, 260 U. S. 545, (1923), Mr. Justice Sutherland said:

> "Subject to certain exceptions, the statutes of a state are binding upon the Federal courts sitting within the state, as they are upon the state courts. One of the exceptions is that these statutes may not be permitted to enlarge or diminish the Federal equity jurisdiction. *Mississippi Mills v. Cohn*, 150 U. S. 202, 37 L. ed. 1052, 44 Sup. Ct. Rep. 75. That juris-

diction is conferred by the Constitution and laws of the United States and must be the same in all the states. *Neves v. Scott*, 13 How. 268, 14 L. ed. 140."

When a court of bankruptcy takes possession of the bankrupt's property, which it most certainly has the jurisdiction to do, such property is withdrawn not only from the jurisdiction of all other courts, federal and state, but it is likewise withdrawn from the jurisdiction of any and all other executive or administrative officers of the federal and state governments. Thus in the case of *Dayton v. Standard*, 241 U. S. 588 (1916), wherein state authorities sold certain real estate for taxes notwithstanding the pendency of bankruptcy proceedings, and the question arose as to the validity of the title of the purchasers, Mr. Justice Van De Vanter said, on page 589:

> "This is a controversy growing out of the sale for taxes and special assessments of divers tracts of real property belonging to a bankrupt estate then in the course of administration in a court of bankruptcy. The property was in *custodia legis* and was sold without leave of court. Because of this the court held the sales invalid, and entered a decree canceling the certificates of purchase, and enjoining the county treasurer from issuing tax deeds thereon. Thus far there is no room to complain."

In *Ex parte Tyler*, 149 U. S. 164, wherein a state officer levied a tax warrant upon property in the hands of a receiver of the federal court, the court said:

> "The levy of a tax warrant, like the levy of an ordinary *fieri facias*, sequestrates the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated

upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face."

In *Mercantile Trust Co. v. Tennessee Central R. Co.*, 294 F. 483 (C. C. A. 6th Circuit, 1923), the court said, on page 488:

"It is further claimed on behalf of the petitioner that, even if the decree of sale did not so provide, the Tennessee statute in reference to the payment of taxes whenever real estate is sold under decree of court establishes a rule of property obligatory upon the federal courts. This statute (Acts Tenn. 1871, c. 68, p. 59) is directed specifically to sales of real estate 'under a decree of any court in the state' and imposes duties upon the judge of the state court that the Legislature of a state cannot impose upon federal judges. *Railway Co. v. Vickers*, 122 U. S. 360, 7 Sup. Ct. 1216, 30 L. Ed. 1161; *Dodge v. Tulleys*, 144 U. S. 451, 457, 12 Sup. Ct. 728, 36 L. Ed. 501; *Tullock v. Mulvane*, 184 U. S. 497, 22 Sup. Ct. 372, 46 L. Ed. 657; *Bein v. Heath*, 53 U. S. (12 How.) 168, 13 L. Ed. 939.

"The federal courts are vested with full equitable jurisdiction and discretion to fix the terms of sale and impose conditions in the decree confirming the sale, and this equitable jurisdiction must be exercised uniformly throughout the United States. This equitable jurisdiction can not be limited or controlled by a state Legislature. *Gamewell Fire Alarm Tel. Co. v. City of New York* (C. C.) 31 Fed. 313; *U. S. v. Howland*, 17 U. S. (4 Wheat.) 108, 4 L. Ed. 526."

In *Murphy v. John Hofman Co.*, 211 U. S. 562, at 568, the Court said:

"But, where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, Federal or state. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdic-

tion of all other courts. The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, *though it is not authorized by any statute.* The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. *Wabash R. Co. v. Adelbert College,* 208 U. S. 38, 54, 52 L. ed. 379, 386, 28 Sup. Ct. Rep. 182. Accordingly, where property was in the possession of the bankrupt at the time of the appointment of a receiver, it was held that the bankruptcy court had jurisdiction to determine the title to it as against an adverse claimant, and that the receiver has no right to deliver it to him without the order of the court. *Whitney v. Wenman,* 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. Rep. 778." (Italics ours.)

Moreover Section 5671 of the General Code of Ohio must be read in the light of other provisions of the Ohio Code providing for the enforcement of the state's lien for taxes. Thus, Section 2667 of the Ohio Code provides:

"When taxes or assessments, charged against lands or lots or parcels thereof upon the tax duplicate, authorized by law, or any part thereof, are not paid within the time prescribed by law, the county treasurer in addition to other remedies provided by law may, and when requested by the auditor of state, shall enforce the lien of such taxes and assessments, or either, and any penalty thereon, by civil action in his name as county treasurer, for the sale of such premises, in the court of common pleas of the county, without regard to the amount claimed, in the same way mortgage liens are enforced."

Construing this Section, the Court of Appeals for Cuyahoga County, Ohio, on June 1, 1931, in the case of *Cook, County Treasurer v. Pomozi,* 35 O. L. B. & Rep. 50, held that the Court of Common Pleas had the authority to con-

firm a tax sale of premises free and clear of liens, even though the sale was for an amount less than the amount of taxes owing. Section 5692 of the General Code of Ohio provides:

> "When land so held by tenants in common are sold upon proceedings in partition, or taken by the election of any of the parties to such proceedings, or real estate is sold at judicial sale, or by administrators, executors, guardians, or trustees, the court shall order the taxes and penalties, and the interest thereon against such lands, to be discharged out of the proceeds of such sale or election."

This Section has likewise been construed as giving the courts all the power and authority necessary to discharge the lien for taxes out of the proceeds of any judicial sale. *Ketchum v. Fitch,* 13 O. S. 201; *Hoglen v. Cohan,* 30 O. S. 436; *Markley v. Whitmore,* 61 O. S. 587. The identical question raised by respondent was raised in the case of *In re Prince & Walter,* 131 F. 546 (D. C. Pa.), in which the court said, on page 549:

> "But it is urged that by the thirty-second section (page 375) of the act the taxes are made a continuing lien on the property, notwithstanding a sale, unless the proceeds are sufficient to pay them, and that they should not fare any differently or better in the bankruptcy court than they would elsewhere, and should therefore be left to be worked out against the property in the hands of the purchaser; the municipalities to which they are due being abundantly secured thereby. In *re Veitch,* 4 Am. Bankr. Rep. 112, 101 Fed. 251. In *re Brinker* (D. C.) 128 Fed. 634; *City of Waco v. Bryan* (C. C. A.) 127 Fed. 79 (dissenting opinion of Shelby, *J.*). But it is not correct to assume that the lien of the taxes continues notwithstanding the sale which has been made. No doubt they would if the matter was regulated purely by the state law. But notwithstanding what has been said above about liens being unaffected by bankruptcy proceedings, it is in

the power of the court to order a sale free and clear of them, regardless of how they would ordinarily stand. In *re Keet*, 11 Am. Bankr. Rep. 117, 128 Fed. 651. And the court having undertaken to administer upon the real estate in the present instance, and directed a sale subject to the lien of the first mortgage, all others were thereby divested; and any one who purchased upon the faith of this, as disclosed by the record, took a clear title, on which nothing further can be imposed."

See also *Isaacs v. Hobbs Tie & Timber Company*, *supra*, and *Straton v. New*, *supra*.

The cases of *Security Trust Co. v. Root*, 72 O. S. 535, and *Stokes v. Georgia*, 42 Ga. 412, do not support respondent's contention. In *Security Trust Co. v. Root* the question arose as to whether the holder of a tax title, procured during the pendency of foreclosure proceedings, had superior title to the purchaser at a subsequent foreclosure sale. The court held that the holder of the tax title was by statute subrogated to the rights of the state, that the issuance thereof was a matter of record and that the holder thereof, *not having been made a party to the foreclosure proceedings*, had the superior title. In *Stokes v. Georgia* the Supreme Court of Georgia held that the purchaser at bankruptcy sale, free and clear of encumbrances, did not procure a title free of taxes, *because the state of Georgia had not been made a party to the bankruptcy proceedings*. Such a situation is entirely different from that in the case at bar in that in the case at bar respondent was made a party to the proceedings in the bankruptcy court and he there set up the same lien which he now seeks to assert. In the recent case of *Baldwin v. Iowa State Travelling Men's Association*, 282 U. S. ...., 51 S. C. Rep. 517, 75 L. Ed. 667, decided May 18, 1931, Mr. Justice Roberts said:

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters

once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

In the case at bar respondent, in compliance with a notice sent him by the bankruptcy court, filed in the bankruptcy court his claim for taxes. The bankruptcy court found such taxes to be a third lien upon the bankrupt's real estate and ordered the same to be transferred from the real estate to the fund to be derived from the sale thereof and ordered the real estate sold free and clear of respondent's lien. If respondent was aggrieved by such order, he had a right to file a petition in the District Court for a review of the same. Not having done so, it is submitted that he cannot now successfully assert that he has a lien on such real estate, particularly in view of the fact that petitioner, in purchasing such real estate, purchased the same relying upon the order of the bankruptcy court, made in a proceeding to which respondent was a party, that the same was free and clear of respondent's lien. In *Lesser v. Gray*, 236 U. S. 70 (1915), the bankruptcy court disallowed a claim against a bankrupt partnership arising out of a contract for the future delivery of cotton bagging. The reason assigned by the referee was that an implied condition of the contract terminated it when involuntary bankruptcy proceedings were instituted and that no legal injury resulted. After a discharge in bankruptcy had been granted the partners, suit was instituted against them in the state court for damages arising out of the breach of the same contract. Upon demurrer such suit was dismissed. Error being prosecuted to this Court, Mr. Justice McReynolds said:

"The petition in the cause now under review was properly dismissed. If, as both the bankruptcy and state courts concluded, the contract was terminated by the involuntary bankruptcy proceeding, no legal injury resulted. If, on the other hand, that view of the law was erroneous, then there was a breach, and defendant Gray became liable for any resulting damage; but he was released therefrom by his discharge. In this state of the record we will not enter upon a consideration of the specific reason assigned by the state court for sustaining the demurrer. *No effort was made by plaintiff in error to secure a review of the action of the bankruptcy court in the direct way prescribed by the statute, and that result may not be obtained indirectly through the present proceeding.* The judgment of the court below is affirmed." (Italics ours.)

It is respectfully submitted that respondent is bound by the order of the bankruptcy court and that he now has no lien upon or claim to the real estate of petitioner for taxes for the years 1924, 1925, 1926 and 1927; that the judgment of the Court of Appeals of Trumbull County, Ohio, should be reversed and final judgment entered in this cause for petitioner, quieting his title to the real estate described in his petition against the claim of the respondent for taxes for the years 1924, 1925, 1926 and 1927.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 54.

I. J. VAN HUFFEL,
Petitioner,

v.

TRACE D. HARKELRODE,
Treasurer of Trumbull County, Ohio,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF TRUMBULL COUNTY, OHIO.
WRIT GRANTED MAY 25, 1931.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

Due to certain questions raised for the first time by respondent in his supplemental brief, counsel for petitioner file this their reply brief.

I.

A PLENARY SUIT WAS NOT NECESSARY OR REQUIRED.

It is claimed in the supplemental brief of respondent that the Bankruptcy Court never acquired jurisdiction over the person of the respondent, first, because there is no provision in the Bankruptcy Act providing for the mailing of notice respecting the filing of a petition for authority to sell real estate and marshal liens thereon, and second, be-

cause a proceeding to determine the priority of liens is a plenary proceeding. These questions are here raised for the first time and it is submitted that they are wholly without merit.

By Section 94, Title 11, U. S. C. (Section 58 of the Bankruptcy Act), creditors are entitled to ten days' notice by mail of all proposed sales of property, and it is claimed that this does not authorize a notice by mail of the filing of a petition for an order to sell, free and clear of liens, and to marshal the liens upon the property. The argument must fall of its own weight, for certainly a petition by a trustee for an order to sell is one to make "a proposed sale," and it is necessary for such petition to be complete that it ask for a sale either subject to incumbrances or free from incumbrances, and, if free from incumbrances, that the same be marshalled and their priority determined. Consequently, the fact that such petition asks for an order marshalling liens and authorizing the sale of the property free and clear of liens, in no wise detracts from the fact that the petition is one for "a proposed sale."

At the time the application was filed notice was given to all creditors of the hearing to be had upon such application (R. 20), and in addition thereto *lien claimants named as parties defendant* in such application were given a specific notice (R. 21), part of which read as follows:

> "Unless your interest is set up by proper pleading at or prior to said hearing, an order will be entered finding that you have no lien." (R. 22.)

Both of these notices were received by the respondent (R. 22) and in response thereto he mailed to the Referee a statement of the taxes due upon the real estate herein involved. He thus submitted himself to the jurisdiction of the court without objection. The fact that neither the respondent nor his counsel, the Prosecuting Attorney, ap-

peared at the hearing, paid no further attention to the proceedings, and had no actual knowledge of the findings of the Bankruptcy Court, determining the priority of liens, until some eight months afterward (R. 23), does not detract one iota from the fact that the respondent submitted himself to the jurisdiction of the court and that the court had jurisdiction to enter the order which it made.

The argument advanced that a proceeding to determine priority of liens is a plenary proceeding is equally groundless. The respondent never had possession of the real estate in question but, as found by the Court of Appeals (R. 19), the bankrupt was the owner and was in possession on the very day it was declared a bankrupt, and naturally the Trustee in Bankruptcy succeeded to the bankrupt's title and possession. That a plenary suit is not necessary where the Bankruptcy Court has possession of the *res* is well settled. In the case of *Taubel-Scott-Kitzmiller Co. v. Fox*, (1924), 264 U. S. 426, wherein the bankruptcy court, by summary process, attempted to dispossess a sheriff of the bankrupt's property, which the sheriff had seized under a writ of execution issued upon a judgment obtained within four months of bankruptcy, but at a time when the bankrupt was still solvent, Mr. Justice Brandeis said, on pages 433 and 434:

> "Wherever the bankruptcy court had possession, it could, under the Act of 1898, as originally enacted, and can now, determine in a summary proceeding controversies involving substantial adverse claims of title under subdivision e of §67, under subdivision b of §60, and under subdivision e of §70. But in no case where it lacked possession could the bankruptcy court, under the law as originally enacted, nor can it now (without consent) adjudicate in a summary proceeding the validity of a substantial adverse claim."

that the State of Ohio cannot be sued except in cases specifically authorized by statute. While this is true, it is equally true that the respondent is the person charged by the laws of the State of Ohio with the collection of taxes due, he is authorized to sue and be sued, and in proceedings instituted for the collection of taxes it is not necessary that the State be made a party thereto but the State shall "be deemed a party through and represented by the County Treasurer." (See Statutes of the State of Ohio set forth in Appendix A hereof.)

A similar question was raised by the Collector of Internal Revenue in the case of *In re Anderson*, 279 Fed. 525, wherein it was contended that service of a show cause order upon the Collector of Internal Revenue was not the equivalent of service upon the United States. The court said:

> "We think the trustee properly initiated these proceedings by making the collector of internal revenue a party. The notice of lien against all the property and rights of property belonging to the bankrupt was filed in the office of the clerk on July 6, 1920, and was recorded. The claim of the United States thus became a public record of which the trustee had to take notice. Notice of hearing on the petition was given to the collector, so that the United States might have opportunity to establish its claim. The official charged with the duty of collecting taxes is the collector of internal revenue, and it was he who filed a claim. It is he who serves notices upon delinquents and receives all payments under Revised Statutes, §§3183, 3184 (Comp. St. §§5905, 5906), and it is he who distrains and sells upon the distress. Section 3187 (Comp. St. §5909). All the duties devolving in such proceeding are those of the collector of internal revenue. He is the proper person to be notified to be brought into court on a proceeding such as the one instituted below. The court granted 10 days after the

service of a copy of the order within which to move to dispute the merits of the finding of the referee below. This was not taken advantage of and the time has expired. We think the government cannot complain as to the exercise of discretion.

"The order below, barring the United States from participating in the estate, must be affirmed."

Respondent in the case at bar occupies identically the same position with relation to the State of Ohio as that occupied by the Collector of Internal Revenue in his relation to the United States. What is true of the Collector of Internal Revenue under such circumstances must be equally true of the respondent. Carrying it to the logical limit, the suggestion of counsel for respondent would seem to deny the right of the referee to call the taxing authorities into his court for any purpose. If this be true, by what process can the taxes be ordered paid and the estate closed?

The contention of the respondent that there is only one method authorized for attacking taxes in Ohio, and that that method is to be found in Section 12075 of the General Code of Ohio, is also erroneous. Section 12075 provides as follows:

"Common pleas and superior courts may enjoin the illegal levy or collection of taxes and assessments; and entertain actions to recover them back when collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected."

Petitioner could not file any suit to enjoin a levy of the taxes here involved for the reason that they had been levied in the years 1924, 1925, 1926 and 1927, prior to the bankruptcy proceedings of The Sterling-Knight Company and prior to the time that the petitioner acquired title to the premises in question. Petitioner was not entitled to

enjoin the collection of such taxes for the reason that the Treasurer had a perfect right to collect the same from the bankrupt estate of The Sterling-Knight Company. Petitioner's only remedy was to enjoin the respondent from asserting any lien upon the premises in question for taxes which he claimed to be due for the years 1924, 1925, 1926 and 1927, a remedy which is obtained through the filing of a suit to quiet title. Moreover, the Supreme Court of Ohio in the recent case of *Conn v. Jones*, 115 O. S. 186 (1926), found and determined that the remedy provided for in Section 12075 was not exclusive but was cumulative to other remedies provided for by law.

II.

PETITIONER IS AN INNOCENT HOLDER FOR VALUE.

In respondent's brief it is contended that the petitioner is not an innocent holder for value inasmuch as the taxes, the lien of which is here in dispute, remained unpaid on the tax duplicate of Trumbull County, which was a public record of which petitioner was bound to take notice. The record of the proceedings had in the bankruptcy of The Sterling-Knight Company in the District Court of the United States for the Northern District of Ohio, Eastern Division, was likewise a public record of which petitioner was bound to take notice. In the latter public record it was disclosed that the lien of the respondent for the taxes here in question had, by order of the Bankruptcy Court, been removed from the premises in question and transferred to the funds to be derived from the sale thereof. It was upon this public record that the petitioner relied in accepting a deed to the premises, subject to taxes only for the year 1928 and thereafter, and he did not choose to rely solely upon the warranty of his grantor.

On pages 8 and 9 of respondent's brief attention is called to the fact that the premises here in question sold

for less than the amount even of the first mortgage, to say nothing about taxes and other liens, and that out of the proceeds of the sale of the mortgaged property $19,171.46 was applied to the payment of the costs of administration, and it is stated that the practice in bankruptcy courts is, where real estate is of less value than the encumbrances, to abandon the property and that that is what should have been done in the instant case; that the costs of administration were paid and the proceeds of the sale of the mortgaged property were distributed long before the respondent "learned anything of the attempt to avoid the payment of the taxes due the State of Ohio." It seems that the inference respondent desires us to draw from this argument is that the mortgage holders attempted in some way to avoid the payment of the taxes here in question. No such argument or contention was made in the courts below, and should this Court feel that there is any merit in such contention the record can be diminuted to show that the same is wholly without merit, for the record below, based upon which the Court of Appeals of Trumbull County made its findings of fact, shows that The Union Trust Company, Trustee, first mortgagee, The Old Dominion Mortgage Company, second mortgagee, and The Second National Bank of Warren, pledgee of the mortgage of The Old Dominion Mortgage Company, all answered the Trustee's petition to sell, requesting in their answers that the property be abandoned for the reason that there was no equity therein for general creditors. Notwithstanding such answers and the position of the mortgagees therein taken, the Referee in Bankruptcy ordered the Trustee in Bankruptcy to sell the premises, free and clear of all encumbrances.

It is perfectly true that the purchase price of $75,000.00 was, at the bankruptcy sale, paid in first mortgage

bonds with no money changing hands, and that the expenses of such sale were paid out of the proceeds of the sale of mortgaged personal property belonging to the same lien claimants, from the sale of which was realized $96,527.30. Had the Referee in Bankruptcy found that the taxes were a first lien upon the property, or had his finding that they were a third lien been reversed upon petition to review, the first mortgagee, who bid the property in at bankruptcy sale, would have had to pay the amount of those taxes in cash. An order to that effect made by the Referee or the reviewing court would have been binding upon the purchaser-mortgagee. Moreover, this argument is one which might perhaps be made if this action were one between the mortgagees and the respondent. The action, however, is not one between the mortgagees and the respondent but is between the respondent and a purchaser from the mortgagee, who in purchasing relied upon an unreversed, unmodified judgment of the Bankruptcy Court in a proceeding to which respondent was a party, in which he appeared and set up his claim, and in which it was ordered that the lien which respondent now seeks to assert against the premises in question be transferred from such premises to the funds to be realized from the sale thereof, and of which funds there were ample if he had chosen to follow them.

III.

THE BANKRUPTCY COURT DID HAVE JURISDICTION TO TRANSFER THE LIEN OF THE STATE FOR TAXES FROM THE PROPERTY TO THE FUND TO BE DERIVED FROM THE SALE THEREOF.

In respondent's supplemental brief upon this point but one additional argument is advanced in favor of his position that the Bankruptcy Court did not have power to transfer his lien for taxes from the property to the fund to be derived from the sale thereof, and that is that the Bankruptcy Act in all of its provisions assumes to protect the taxes due the sovereign states and that these taxes are not affected by a discharge in bankruptcy. True it is that the Bankruptcy Act in all its provisions assumes to protect the taxes due to the sovereign states, but in the case at bar respondent did not see fit to avail himself of the provisions of the Bankruptcy Act enacted for the purpose of protecting the same. In other words, the Bankruptcy Court was not without jurisdiction. At most it committed an error in holding the lien of the respondent to be a third lien upon the premises in question. Such a finding could have been corrected under the provisions of the Bankruptcy Act, had respondent given any attention to the proceedings had before the Referee, of which he was notified and in which he appeared and set up his claim. Having contented himself merely with the filing of his claim and not having seen fit to pay any further attention to the proceedings, he most certainly is not now in a position to complain. While the obligation to pay taxes assessed upon real property may not be affected by a discharge in bankruptcy, there is nothing in the Bankruptcy Act which forbids the Bankruptcy Court, with all interested parties before it, from transferring the lien of such taxes from the property of the bankrupt to the fund to be derived from the sale of such property, thereby discharg-

ing the *property* from the lien thereof. That the Bankruptcy Court has such power seems clear from the statutes and authorities to which attention has heretofore been called.

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APPENDIX A.

The following Sections of the General Code of Ohio show that the respondent is the officer who by law is charged with the duty of collecting taxes, and that he can both sue and be sued:

"§2658. *Collection of overdue taxes by distress.*—When taxes are past due and unpaid, the county treasurer may distrain sufficient goods and chattels belonging to the person charged with such taxes, if found within the county, to pay the taxes so remaining due and the costs that have accrued. He shall immediately advertise in three public places in the township where the property was taken the time and the place it will be sold. If the taxes and costs accrued thereon are not paid before the day appointed for such sale, which shall be not less than ten days after the taking of the property, the treasurer shall sell it at public vendue or so much thereof as will pay such taxes and the costs."

"§2660. *Proceedings when unable to collect taxes by distress.*—If the county treasurer is unable to collect by distress taxes assessed upon a person or corporation or an executor, administrator, guardian, receiver, accounting officer, agent or factor, he shall apply to the clerk of the court of common pleas in his county at any time after his semi-annual settlement with the county auditor, and the clerk shall cause notice to be served upon such corporation, executor, administrator, guardian, receiver, accounting officer, agent or factor, requiring him forthwith to show cause why he should not pay such taxes. If he fails to show sufficient cause, the court at the term to which such notice is returnable shall enter a rule against him for such payment and the costs of the proceedings, which rule shall have the same force and effect as a judgment at law and shall be enforced by attachment or execution or such process as the court directs."

"§2667. *Action by treasurer for unpaid taxes or assessments.*—When taxes or assessments, charged

against lands or lots or parcels thereof upon the tax duplicate, authorized by law, or any part thereof, are not paid within the time prescribed by law, the county treasurer in addition to other remedies provided by law may, and when requested by the auditor of state, shall enforce the lien of such taxes and assessments, or either, and any penalty thereon, by civil action in his name as county treasurer, for the sale of such premises, in the court of common pleas of the county, without regard to the amount claimed, in the same way mortgage liens are enforced."

"§2669. *Petition and evidence.*—Having made the proper parties, it shall be sufficient for the treasurer to allege in his petition that the taxes and assessments, or either, are charged on the tax duplicate against such premises, the amount thereof, and are unpaid, and he shall not be required to set forth in the petition any other or further special matter relating thereto. On the trial a certified copy of the entry on the tax duplicate, shall be prima facie evidence of such allegations and of the validity of such taxes and assessments."

"§2670. *Judgment and decree.*—Judgment shall be rendered for such taxes and assessments, or any part thereof, as are found due and unpaid, and for penalty and costs, for the payment of which the court shall order such premises to be sold without appraisement. From the proceeds of the sale the costs shall be first paid, next the judgment for taxes and assessments, and the balance shall be distributed according to law. The owner or owners of such property shall not be entitled to any exemption against such judgment, nor shall any statute of limitations apply to such action. When the lands or lots stand charged on the tax duplicate as forfeited to the state, *it shall not be necessary to make the state a party, but it shall be deemed a party through and represented by the county treasurer.*" (Italics ours)

"§5674. *Collection of tax of transient trader.*—When the county auditor certifies to the county treasurer the amount of tax assessed upon a return made

by or for a transient trader, under chapter three of this title, the treasurer shall forthwith enter it upon the duplicate and notify such trader of the amount assessed. If he neglects or refuses to pay the amount within twenty-four hours after receiving such notice, the treasurer shall collect it by any process or proceeding authorized in a case of delinquent personal property tax."

"§5695. *Collection of taxes.*—The county treasurer shall forthwith *collect* the taxes and penalty on the duplicate *by any of the means provided by law,* and the funds so collected shall be distributed in proper proportions to the appropriate funds." (Italics ours)

"§5697. *How treasurer to collect delinquent personal tax.*—When personal taxes stand charged against a person, and are not paid within the time prescribed by law for the payment of such taxes, the treasurer of such county, in addition to any other remedy provided by law for the collection of personal taxes, shall enforce the collection thereof by a civil action in the name of such treasurer against such person for the recovery of such unpaid taxes. It shall be sufficient, having made proper parties to the suit, for the treasurer to allege in his bill of particulars or petition that the taxes stand charged upon the duplicate of the county against such person, that they are due and unpaid, and that such person is indebted in the amount appearing to be due on the duplicate, and the treasurer need not set forth any other or further special matter relating thereto. The tax duplicate shall be prima facie evidence on the trial of the action, of the amount and validity of the taxes appearing due and unpaid thereon, and of the non-payment thereof, without setting forth in his petition any other or further special matter relating thereto."

"§5700. *When county officer allowed counsel.*—When an action has been commenced against the county treasurer, county auditor, or other county officer, for performing or attempting to perform, a duty authorized or directed by statute for the collection of the

To the same effect see *First National Bank v. Chicago Title & Trust Co.*, (1905) 198 U. S. 280; *Whitney v. Wenman*, (1905) 198 U. S. 539.

The cases of *Ray v. Norseworthy*, 90 U. S. 128, and *Factors & Traders Insurance Co. v. Murphy*, 111 U. S. 738, and *In re Henderson*, 206 Fed. 139, are not authorities in favor of respondent's position that a proceeding to determine the priority of liens, where the bankruptcy court is in possession of the property, is a plenary proceeding. These cases are merely to the effect that a lien claimant cannot be dispossessed of his lien without notice. In the case of *Ray v. Norseworthy, supra*, the court said:

> "Beyond all doubt the property of a bankrupt may, in a proper case, be sold by order of the bankrupt court free of incumbrance, but it is equally clear that in order that such a proceeding may be regular and valid the assignee must apply to the bankrupt court for an order to that effect, and must set forth the facts and circumstances which it is supposed justify the application, that the judge may decide whether or not the application shall be granted. Secured creditors in such a proceeding must have due opportunity to defend their interests and, consequently, must be properly notified and summoned to appear for that purpose. *Foster v. Ames*, 1 Low. 316; *Willard v. Brigham*, 25 La. Ann. 601.
>
> "None of these conditions were fulfilled in this case. Instead of that the State Court finds that the petitioner was never properly notified and that he was not made a party to the proceeding resulting in the order to sell the property in question free of his prior mortgage, and it was upon that ground that the State Court decided that his rights were unaffected by the proceedings."

In the case at bar the Court of Appeals in its Finding of Fact No. 4 (R. 20) specifically found that, upon the filing of the petition to sell, the Referee "in the manner

and form as provided by the Bankruptcy Laws of the United States mailed to all known creditors" notice of the filing thereof and of the date set for hearing the same. Further, that, upon the filing of such petition, the Referee "mailed to those named as claiming any lien upon the property" an additional notice, to which was appended the following:

> "Unless your interest is set up by proper pleading at or prior to said hearing an order will be entered finding that you have no lien." (R. 22.)

The Court of Appeals further found that the notices so mailed were received by the respondent, "who, upon receipt thereof, mailed to the Referee a statement of the taxes due." Thus, in the case at bar the state court expressly found that the respondent had been notified "in the manner and form as provided by the bankruptcy laws of the United States." It is thus apparent that the respondent had due opportunity to defend his interest, and that he failed so to do is no excuse for the situation in which he now finds himself. *In re De Angeles,* 36 Fed, 2d. 218 (C. C. A. 10th Circuit 1929).

Moreover, even though a proceeding to determine the priority of liens were to be classed as a plenary proceeding, respondent, having been notified of the summary proceedings taken and having filed in response to such notice his statement of taxes due without objecting to the character of the proceeding, cannot now be heard to complain that the proper procedure was not adopted. *In re Rockford Produce & Sales Co.,* 275 Fed. 811 (C. C. A. 7th Circuit 1921); *Board of Trade v. Johnson,* 283 Fed. 374 (C. C. A. 7th Circuit 1922); *In re Hollingsworth & Whitney Co.,* 242 Fed. 753 (C. C. A. 1st Circuit 1917).

It is further claimed on behalf of respondent that he is purely a ministerial officer of the State of Ohio and